89-1081

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FOLDING CARTON ADMINISTRATION COMMITTEE:
THOMAS J. BOODELL, JR., PERRY GOLDBERG, JAMES B. SLOAN
AND ALEXANDER R. DOMANSKIS,

Petitioners.

VS.

FOLDING CARTON RESERVE FUND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

on behalf of the members of The Folding Carton Administration Committee

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December 11, 1989

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QUESTION PRESENTED

Whether a United States Court of Appeals may *sua sponte* and without the articulation of any standards deny fees for court-appointed officers solely on the ground that the reviewing court disagrees with the goal achieved through their services?

PARTIES TO THE PROCEEDING

Petitioners hereby adopt and respectfully direct the Court to the "Parties to the Proceeding" section set out in full in the Honorable Judge Hubert L. Will's Petition for a Writ of Mandamus or Prohibition to the Honorable Harlington Wood, Jr., Richard D. Cudahy and Michael S. Kanne, Judges of the United States Court of Appeals for the Seventh Circuit, or, in the Alternative, Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit filed on December 8, 1989 under the caption *In Re Hubert L. Will* for a complete list of all parties.*

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* Petitioners have designated the Folding Carton Reserve Fund as respondent in this proceeding in order to comply with Supreme Court Rule 33.2(a)(4). However, there is, in fact, no party who is adverse to Petitioner's claim.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FOLDING CARTON ADMINISTRATION COMMITTEE:
THOMAS J. BOODELL, JR., PERRY GOLDBERG, JAMES B. SLOAN
AND ALEXANDER R. DOMANSKIS,

Petitioners,

VS.

FOLDING CARTON RESERVE FUND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, members of the Folding Carton Administration Committee* appointed by the Honorable Judges Hubert L. Will and Edwin A. Robson, respectfully adopt and support the Petition for a Writ of Mandamus or Prohibition filed in this Court by the Honorable Hubert L. Will and the Petition for a Writ of Certiorari filed by the certified plaintiff class. Petitioners further respectfully request that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in *In re Folding Carton Antitrust Litigation*, 881 F.2d. 494 (7th Cir.

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* The members of the Committee are Thomas J. Boodell, Jr., Perry Goldberg, James B. Sloan and Alexander Domanskis, all practicing attorneys in Chicago.

1989), (Will Appendix B)*, which denies attorneys' fees to the Committee for legal work "that related to the second effort to establish an antitrust use for the Reserve Fund" prior to the government's appeal to the court of appeals and also for work "on appeal related to the second effort to establish or defend the research projects for class actions and antitrust." (Will Appendix B, p. 16b). This Court should issue a writ in order to review the court of appeals' decision which in effect penalizes court-appointed officers for fulfilling their judicially-directed duties solely because the court of appeals disagrees with an order entered by the district court which Petitioners served.

Issuance of this writ is necessary to prevent the certain chilling effect the court of appeals' decision will have upon the ability of the district court to obtain willing and competent counsel to assist the court, particularly in complex litigation where such assistance is essential. When reviewing courts determine that appointed and directed officers such as Masters, Receivers, or as in this case, members of an Administration Committee, may not be compensated for work performed because the reviewing court disagrees with the order(s) of the lower court, qualified professionals will no longer be willing to provide these services to the judiciary.

A related issue is the extent of an appellate tribunal's power to preempt the ability of the district court to compensate the officers it appoints. In this case the Seventh Circuit, *sua sponte*, determined that no compensation for certain

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* References to the Appendices filed on December 8, 1989 in the Honorable Hubert L. Will's Petition for a Writ of Mandamus or Prohibition to the Honorable Harlington Wood, Jr., Richard D. Cudahy and Michael S. Kanne, Judges of the United States Court of Appeals for the Seventh Circuit, Or, in the Alternative, Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit which was filed with this Court under the title *In re Hubert L. Will* no. 89-927 will be designated "Will Appendix ____." References to the Appendix to this Petition will be designated "Appendix ____"

services could be paid and further failed to articulate any standards by which such a determination was made in this instance or could be made in future cases.

Petitioners respectfully request that this Court issue a writ of certiorari to review the September 11, 1989 order and reverse the court of appeals' decision in regard to the denial of attorneys' fees for work performed at the direction of the district court on the ground that its decision was erroneous as a matter of law, or alternatively, that the court of appeals' decision was not based on any articulated standard.

OPINIONS BELOW

The court of appeals issued the order from which relief is sought on September 11, 1989. (Will Appendix A). The judgment of the district court was affirmed in an order dated August 9, 1989 (Will Appendix C) and an opinion in the case was issued the same day. (Will Appendix B). The August 9, 1989 order was vacated in another order of September 11, 1989. (Will Appendix D). The district court's opinion issued May 24, 1988, on remand from the court of appeals' September 5, 1984 decision, is reported at 687 F. Supp. 1223. (Will Appendix J). Petitions for Rehearing were filed on August 23, 1989. Those Petitions were denied on September 15, 1989.

JURISDICTION

The court of appeals issued the order from which relief is sought on September 11, 1989. Petitions for rehearing were denied on September 15, 1989.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and § 1651(a).

STATEMENT OF THE CASE

This appeal grows out of an antitrust claim by 2700 purchasers of folding cartons who sought damages from 24 defendants in a multi-district litigation known as *In re Folding Carton Antitrust Litigation*, MDL-250. A detailed recitation of the background and facts of this litigation is set forth in the opinion of the Honorable Hubert L. Will, *In Re Folding Carton Antitrust Litigation*, 687 F. Supp. 1223 (N.D. Ill. 1988) (Will Appendix J), and in the opinion of the court of appeals below. (Will Appendix B).* The class actions were consolidated in the Northern District of Illinois. After four years of pretrial proceedings and extensive discovery in the original case, the defendants agreed to settle and paid in excess of $200 million into an escrow account.

After the above settlement in the fall of 1979, Judges Will and Robson appointed a panel of attorneys to review all attorneys' fees applications relating to the litigation. After the panel successfully resolved attorneys' fees matters, the district court formally designated the panel an Administration Committee pursuant to MDL-250 Administrative Order No. 1, "to report to the court on the status of claims filed and submit for the court's consideration any other proposals for administration and distribution of the settlement funds."

The Committee eventually recommended payments in excess of $200 million to claimants. After reviewing and substantially approving those payments, the district court solicited recommendations regarding the disposition of the residue of approximately $6 million remaining in the settlement fund.** After receiving recommendations from all

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* Other reported decisions which recite the background of this case are *In Re Folding Carton Antitrust Litigation*, 557 F. Supp. 1091 (N.D. Ill. 1983), *affirmed in part, reversed in part*, 744 F.2d 1252 (7th Cir. 1984).

** The residue resulted from an initial reserve for mistakes and unanticipated costs neither of which occurred, and an extremely favorable investment climate.

parties and the Committee, the district court decided that the residue should first be used to pay late claimants and further that any remaining monies should be used to fund a foundation for research on complex class actions and antitrust issues. *In Re Folding Carton Antitrust Litigation*, 557 F. Supp. 1097, 1112 (N.D. Ill. 1983).

Six of the class claimants and two of the settling defendants appealed the district court's decision. The court of appeals affirmed the district court's holding that none of the appellants were entitled to any of the remaining funds, but reversed the district court's use of the *cy pres* doctrine to establish a research foundation to study complex class actions and antitrust issues. The court of appeals found that that was an "abuse of discretion" because, in its view, further study on the subject was unnecessary. *In Re Folding Carton Antitrust Litigation*, 744 F.2d 1252, 1254-5 (7th Cir. 1984). Instead, the court of appeals directed that any money remaining after satisfying late claimants should "escheat" to the United States in accordance with 28 U.S.C. §§ 2041, 2042. 744 F.2d at 1256.

Several of the parties petitioned this Court for a writ of certiorari and, at the direction of the district court, the Committee sought a writ of mandamus or, alternatively, a writ of certiorari on behalf of the district judges on the ground that the court of appeals contravened the sound exercise of appellate discretion when it substituted its findings for those of the district court. While those petitions were before this Court, the parties reached a settlement regarding the remaining funds. The Settlement Agreement provided that the residue of the settlement fund was to be used to pay any unpaid class members and remaining funds were to be divided equally between (i) a pro rata distribution to all class members who had previously been paid and (ii) two or more Chicago area law schools "for the purpose of furthering research projects involving analysis and enforcement of the antitrust laws and/or the improved management of complex multi-

party litigation and/or scholarship assistance for needy students." (Appendix, p. 2).

After issuance of the Seventh Circuit's Opinion providing for "escheat" of unclaimed funds to the U.S. Treasury pursuant to 28 U.S.C. §§ 2041, 2042, the government was notified both of its potential interest in the residual fund and of the parties' desire to settle the matter on the terms described above. At the initial hearing on the Settlement Agreement, the district court indicated that it would not approve the Settlement until the court was advised whether or not the government would object. Thereafter, the government indicated that it would not object to approval of the Settlement Agreement. (Will Appendix J, pp. 8j-9j). Upon approval of the Settlement by the district court on March 28, 1985, all petitions pending in this Court were withdrawn.

In accordance with the district court's order, notices were published and late claims were filed and reviewed by the Committee. After payment of late claims and reasonable costs, and payment of one-half of the remainder to class members who had previously received payments, the district court in April, 1987 made initial grants to law schools based upon pending grant applications.

Then, in July, 1987, after the initial grants to law schools were approved and over two years after the Settlement Agreement was approved, the United States filed a Motion to Intervene and to Vacate the Settlement, arguing that the residue should escheat to the government. After full briefing, the district court denied the government's motion. On appeal, the court of appeals affirmed the district court's denial of the government's motion to intervene but nevertheless found that the Settlement's plan to fund research projects was void. The court also ordered that "no fees are . . . to be permitted for any legal work that related to the second effort to establish an antitrust use for the Reserve Fund which is now voided . . . (and) no fees shall be allowed for any legal service on appeal related to the second effort to establish or defend

the research projects for class actions and antitrust." (Will Appendix B, p. 16b).

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD REVIEW THE COURT OF APPEALS' ARBITRARY DENIAL OF ATTORNEYS' FEES

In the *Folding Carton* litigation, Judges Will and Robson appointed the Committee to work at the direction and under the control of the court. The district court ordered the Committee to complete many tasks, among these to review attorneys' fees applications, to examine claims and make recommendations for payment, to handle objections to claims and recommend solutions, and to defend the orders of the district court on appeal. The Committee served the district court only in the capacities specified by the court.

When the Committee's members sought compensation for work performed on the district court's behalf, the four members of the Committee filed individual applications with the district court. The district court judges reviewed and approved payment of the Committee members' fee requests after notice and hearing. Although no issue was raised by the government in its aborted motion to intervene, the appellate court, *sua sponte*, determined that no fees should be awarded at the district or appellate levels for work relating to the funding of grants to local law schools for the research of antitrust or complex litigation.

The arbitrary nature of the decision by the court of appeals to deny attorneys' fees for certain work performed constitutes a dangerous precedent. In the litigation before it, the court of appeals only faced the government's appeal from the district court's denial of its motion to intervene; the propriety of attorneys' fees for services rendered to the district

court was not an issue on appeal and was never briefed or argued in the court of appeals.

The decision to award attorneys' fees is ordinarily a question of fact for the district court which determination can be overturned only when the court of appeals finds an abuse of discretion. *Tomazzoli v. Sheedy*, 804 F.2d 93, 97 (7th Cir. 1986). This case presents an uncommon situation where the court of appeals has essentially prejudged the district court's ruling on attorneys' fees before the award is sought or made and without briefs or arguments from the interested parties. The court of appeals' order unfairly penalizes the Committee members without even a hearing on the attorneys' fees issue.

Apart from the procedural unfairness of the ruling, and much more important to this Court's concerns for the administration of justice, the Seventh Circuit's decision also will impair the district court's ability to secure the services of professionals who are willing to work for the judiciary on an *ad hoc* basis. The four members of the Committee, having agreed to serve collectively as officers of the district court, had a reasonable expectation of being fairly compensated for work performed at the court's direction. The possibility that a reviewing court may later deprive the district court of the ability to compensate its appointed officers will discourage the acceptance of such appointments by qualified professionals.

The inequity in the result reached by the Seventh Circuit is best illustrated by examining the basis upon which the court reversed that portion of the Settlement providing for grants to law schools. In its opinion, the court recognized (as the Committee had contended and the district court found), that the government was estopped from intervening in the case and claiming an interest in the residual fund by virtue of its inaction in the face of repeated notices of its potential interest in the fund. (Will Appendix B, pp. 13b-14b). Thus, the court determined that the government had no claim to any portion of the remaining funds. The court then found

that although use of the *cy pres* doctrine was appropriate to determine the manner in which the residual fund would be distributed, this particular application of *cy pres* (agreed to by all parties, including the government) was improper. On remand, the court stated that the district court was free to "consider entirely different and appropriate uses under the *cy pres* doctrine." (*Id.* p. 15b). As an example, the court suggested a grant to the Federal Judicial Center Foundation, "an independent government agency responsible for providing education and training services to all judicial personnel, as well as research and systems development services to the courts, the Judicial Conference of the United States, and to the Congress." (*Id.* at n.8). Thus, the district court's order regarding the residual fund was reversed not because use of *cy pres* was inappropriate as a matter of law, but because, on a philosophical level, the court of appeals disagreed with the *cy pres* purpose to which the remaining funds were devoted. Had the district court directed that a grant be made to the Federal Judicial Center rather than local law schools, the Committee members would have been paid. As a consequence of this difference of opinion as to the need for an antitrust grant, the Committee members are penalized. Compensation is denied not because their work was unsatisfactory or failed any other judicial standard, but because they failed to predict the outcome of the philosophical disagreement between the district and circuit courts regarding the appropriate use of these funds.

Under any view of the facts of this case, the circuit court's determination that the Committee should receive no compensation for services performed on behalf of the district court is arbitrary and should be reversed. Apart from the substantive inequity of the result, it is unquestionably procedurally irregular in that no party had briefed or argued the attorneys' fees issue before the court of appeals. Finally, in its opinion, the Seventh Circuit articulates absolutely no standards applicable to the determination of whether

court-appointed officers should be fairly compensated for their services. This arbitrary determination contributes an element of uncertainty to the task of fulfilling court-directed duties which will most certainly discourage the willingness of the bar to accept such appointments in the future. All of these considerations weigh in favor of reversal of that portion of the Seventh Circuit's opinion which, *sua sponte*, prohibited the payment of any fees to members of the Committee for their efforts in implementing and upholding on appeal that portion of the Settlement Agreement providing for grants to area law schools.

II. THE COMMITTEE MEMBERS, AS COURT APPOINTED OFFICERS, SHOULD BE COMPENSATED ON A QUANTUM MERUIT BASIS FOR ALL WORK DONE AT THE COURT'S DIRECTION

The Administration Committee, appointed by Judges Will and Robson, performed court-directed tasks. Its sole purpose was to create a more manageable case for the district court judges. The four committee members acted as separate, judicially-appointed officers to which the judges could assign certain tasks. In this regard, the Committee members are similar to Masters or Receivers, both of which, of course, are court-appointed, neutral assistants responsible to the court.

This Court has determined that Masters appointed by a court to assist with a case are entitled to fair and reasonable compensation for time spent at the direction of the court. *Newton v. Consolidated Gas Co.*, 259 U.S. 101 (1921). In *Newton*, this Court determined that a Master's compensation should reasonably relate to the work done, time employed and responsibilities assumed by the Master. In other words, a court-appointed officer should be compensated on a quantum meruit basis: fair pay dependent on the three variables utilized by the *Newton* Court.

The principle guiding this Court's ruling in *Newton* is that court-appointed assistants work as a neutral force, aiding

the judiciary in the particular litigation at hand. The Committee's work in this case unquestionably saved the district court judges precious time which they could better utilize on other matters. Other courts have recognized the value of the court assistant. *In re Revenue Properties Co. Ltd. Litigation Cases*, 61 F.R.D. 613 (D. Mass. 1974), *vacated and remanded without opinion*, 502 F.2d 1161 (1st Cir. 1974); *American Safety Table Co. v. Schreiber*, 415 F.2d 373 (2d Cir. 1969), *cert. denied*, 396 U.S. 1038 (1970).

The benefits to the judiciary which result from using a Master or administrative aid are likewise present in cases involving court-appointed Receivers. Although the circumstances which demand such an appointment are different, the standards upon which courts determine a Receiver's compensation are the same.

This Court has held that a Receiver's compensation is to be determined by the circumstances of each case, and by taking into consideration the degree of responsibility needed for the case and the Receiver's business experience. *Stuart v. Boulware*, 133 U.S. 78, 82 (1890). Other cases have fashioned similar standards. *Donovan v. Robbins*, 588 F. Supp. 1268, 1272 (N.D. Ill. 1984), citing *In re Westee Corp.*, 313 F. Supp. 1296, 1302 (S.D. Tex. 1970); *In re Yuba Consolidated Industries, Inc.*, 260 F. Supp. 930, 939 (N.D. Cal. 1966).

In *Donovan*, the district court examined a challenge to the Receiver's fees but determined that the fees were due and owing. The court specified that "although the receiver may not have increased the value of the property administered, the receiver diligently and successfully discharged the responsibilities placed upon him by the Court and is entitled to reasonable compensation for his efforts." *Donovan v. Robbins*, 588 F. Supp. at 1273.

Like a Master or a Receiver, the Committee members were court-appointed officers who acted at the direction and

behest of the district court. Their efficient administration of this case resulted in the substantial residual fund which has generated so much controversy. The Settlement Agreement, submitted by the parties and approved by the district court herein only after consultation with all parties and with the government, was the operative document for final resolution of the matters herein. Neither the Committee nor its individual members were parties to the litigation or signatories to the Settlement Agreement. Once the Settlement was in place, the Committee members acted only at the direction of the court to carry out the terms of the Settlement and ultimately to defend the district court and the Settlement Agreement which that court approved. For their services in this regard, the Committee members are entitled to fair and reasonable compensation.

It must be stressed that the Committee members had no position or interest at stake with regard to the Settlement, unlike the claimants seeking compensation or the law schools petitioning for grants. The Committee members now find themselves caught in the middle of a philosophical disagreement between the district court and the court of appeals as to which is the best charity to receive these funds. But the Committee's master is and always has been the district court. The Committee members should not be punished for serving that court loyally, faithfully and with as much skill as was at their disposal.

CONCLUSION

For the foregoing reasons, Petitioners, members of the Folding Carton Administration Committee, respectfully request issuance of the writ of certiorari sought by this Petition.

Respectfully submitted,

One of the Attorneys for the members of the Folding Carton Administration Committee

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE FOLDING CARTON ANTITRUST LITIGATION	**Master File No. MDL-250**

STIPULATED ORDER OF SETTLEMENT

The Court, pursuant to the stipulation of the undersigned parties, hereby orders:

1. This agreement is made solely for the purpose of settling existing disputes with respect to the ownership and disposition of the remainder of the Folding Carton Settlement Fund and without any concession as to the validity of the position taken during this dispute by any party to this agreement.

2. Members of the Plaintiff Class who have failed to file timely claims may submit their claims to the Court until December 31, 1985. The Administration Committee shall take appropriate steps to locate and inform such members of their right to file claims. Such claims shall be determined according to the criteria previously established by this Court in ruling upon late claim submissions.

3. Upon application, the Court may direct the payment from the Settlement Fund of (a) reasonable costs of administration and (b) reasonable attorney's fees, if any, incurred by the Administration Committee and counsel for the parties involved in the appeals relating to the residual fund, appeals Nos. 83-1467, 83-1468, 83-1506, 83-1507 and 83-1673.

4. Any funds remaining after the payments made pursuant to paragraphs 2 and 3 above shall be divided in two (2) equal parts and distributed as follows:

(a) One-half shall be promptly distributed *pro rata* to all class members who have received or will receive payments on their claims.

(b) One-half shall be distributed as promptly as possible, but in any event no later than April 1, 1986, to two or more existing Chicago area law schools, namely University of Chicago Law School, Northwestern University Law School, Loyola University Law School, DePaul University Law School, Chicago-Kent College of Law, and John Marshall Law School, for the purpose of furthering research projects involving analysis and enforcement of the antitrust laws and/or the improved management of complex multi-party litigation and/or scholarship assistance for needy students.

(c) Applicants for distribution of the fund under paragraph 4(b) above are encouraged, to the extent they deem appropriate, to consult with the Administrative Office of the United States Courts, the Federal Judicial Center, the American Judicature Society, the Institute for Judicial Administration, the Brookings Institution or other similar organizations to elicit suggestions or comments with respect to their applications.

5. All signatories to this agreement shall receive notice of all further orders and proceedings and shall have the opportunity to be heard with regard to the approval of late claims and applications for distribution of the fund under paragraph 4(b) above.

6. All signatories to this agreement agree to waive all rights of further review of any orders directing payments pursuant to the terms of this Order.

7. The stipulations contained in this agreement are contingent upon approval and entry of this Order by the District Court and the Order becoming final within 45 days of the date thereof.

Agreed:

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE FOLDING CARTON ANTITRUST LITIGATION	**Master File No. MDL-250**

AGREED ORDER

The Court, pursuant to the agreement of the parties who are signatories to the Stipulated Order of Settlement in this matter dated March 28, 1985, hereby orders:

On March 28, 1985, a Stipulated Order of Settlement was signed by the parties and approved by the Court. A copy of the Order is attached hereto as Exhibit A. All parties with interest in the matters contained therein were notified by the Order, and no objections were made. Pursuant to paragraph 7 of the Stipulated Order of Settlement, the Stipulated Order of Settlement is hereby declared final.

Dated: April 1, 1985 ENTER: /s/

United States District Court

Counsel for Avery International Corporation, Hanschy Industries, Inc., John C. Gilmore (as successor in interest to Wm. Y. Gilmore & Sons, Inc.), Zachary Confections, Inc.

/s/

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Dated: March 28, 1985

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ENTER:

/s/

United States District Court

ENTER:

/s/

United States District Court

Nos. 89-927, 89-992 and 89-1021

In the Supreme Court of the United States

OCTOBER TERM, 1989

IN RE HUBERT L. WILL, SENIOR JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, PETITIONER

CERTIFIED PLAINTIFF CLASS IN MDL-250, PETITIONER

v.

FOLDING CARTON RESERVE FUND, ET AL.

FOLDING CARTON ADMINISTRATION COMMITTEE: THOMAS J. BOODELL, JR., PERRY GOLDBERG, JAMES B. SLOAN AND ALEXANDER R. DOMANSKIS, PETITIONERS

v.

FOLDING CARTON RESERVE FUND, ET AL.

ON PETITION FOR A WRIT OF MANDAMUS OR PROHIBITION AND PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a court of appeals has authority to vacate in part a settlement agreement in violation of the court's prior, outstanding mandate.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-927

IN RE HUBERT L. WILL, SENIOR JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, PETITIONER

No. 89-992

CERTIFIED PLAINTIFF CLASS IN MDL-250, PETITIONER

v.

FOLDING CARTON RESERVE FUND, ET AL.

No. 89-1081

FOLDING CARTON ADMINISTRATION COMMITTEE: THOMAS J. BOODELL, JR., PERRY GOLDBERG, JAMES B. SLOAN AND ALEXANDER R. DOMANSKIS, PETITIONERS

v.

FOLDING CARTON RESERVE FUND, ET AL.

ON PETITION FOR A WRIT OF MANDAMUS OR PROHIBITION AND PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, 89-927 Pet. App. 1b-22b, is reported at 881 F.2d 494. The opinion of the district court, 89-927 Pet. App. 1j-30j, is reported at 687 F. Supp. 1223.

JURISDICTION

The judgment of the court of appeals was entered on September 11, 1989. A petition for rehearing was denied on September 15, 1989. 89-927 Pet. App. 1e-2e. The petition for a writ of mandamus or prohibition or, in the alternative for a writ of certiorari in No. 89-927, and the petitions for a writ of certiorari in No. 89-992 and No. 89-1081 were filed on December 11, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1651(a) and 28 U.S.C. 1254(1).

STATEMENT

This case concerns the disposition of a several million dollar surplus remaining in the *Folding Carton* antitrust litigation settlement fund (known as the reserve fund). In the first of two decisions regarding the reserve fund, the Court of Appeals for the Seventh Circuit held that 28 U.S.C. 2042 requires the surplus to be deposited in the United States Treasury "in the name and to the credit of the United States." Subsequently, the parties to the class actions, with the approval of the district court, entered into settlement agreements that purported to disburse the reserve fund in a manner inconsistent with the court of appeals' mandate. The United States ultimately contested those agreements and sought to enforce the mandate of the court of appeals. In a second decision, which petitioners ask this Court to review, the court of appeals held that the agreements conflicted with the court's original mandate and must be set aside in part. At the same time, the court held that although its original mandate ran in favor of the United States, the United States is equitably estopped from seeking enforcement of the mandate and the statute on which it rests.

1. The present civil litigation grows out of a 1975 criminal antitrust suit brought by the United States against more than 70 manufacturers of folding cartons and their corporate officers. That suit charged the manufacturers and their

officers with conspiring to fix prices in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. The United States prevailed in that litigation against virtually all the defendants. See generally *United States* v. *Alton Box Board Co.*, 1977-1 Trade Cas. (CCH) ¶ 61,336 (N.D. Ill. 1977).

In the wake of the government's successful criminal prosecution, customers of the folding carton manufacturers filed civil class actions and renewed the price-fixing allegations that underlay the criminal suit. The civil actions were consolidated in the United States District Court for the Northern District of Illinois. See *In re Folding Carton Antitrust Litigation*, 415 F. Supp. 384 (J.P.M.L. 1976).

In September 1979, all of the class actions were settled by the defendants' establishing a $200 million fund to be distributed to class member carton purchasers pursuant to an agreed-upon plan. Gov't C.A. App. 49. Disbursements from the settlement fund were processed by an Administration Committee appointed by the district court. Gov't C.A. App. 50.

2. After all payments to the class claimants were made, approximately $6 million remained in the settlement fund. Gov't C.A. App. 51. In February 1983, the district court issued an order governing the distribution of that surplus, which the court called the "reserve fund." 89-927 Pet. App. 1i.

The district court first determined that the antitrust defendants had no claim to legal ownership of the reserve fund because the settlement agreement provided for irrevocable transfer of the money to the settlement fund. 89-927 Pet. App. 15i. It next ruled that the previously paid plaintiff class claimants likewise had no legal claim to the remaining funds; under the settlement agreement, their recovery was a fixed percentage of their total purchases of relevant material

during the applicable period, a sum which they had already received. 89-927 Pet. App. 17i-18i. The court then held that the plaintiff class members who had failed to file timely claims also had no legal interest in the excess funds. 89-927 Pet. App. 20i-21i. Finally, the district court rejected any theory that the money escheated to either the State of Illinois or the United States. 89-927 Pet. App. 21i.

Turning from legal to equitable considerations, the district court determined that neither the antitrust defendants nor the previously paid claimants and their attorneys had valid equitable claims to the surplus funds. The court also determined, however, that the plaintiff class members who had not yet sought payments had cognizable equitable claims. 89-927 Pet. App. 24i-28i. Accordingly, the district court ordered that renewed efforts be made to locate any remaining plaintiff class members who had not made claims, and that the reserve fund be held for one year to meet any such late claims. 89-927 Pet. App. 33i-34i. At the end of that one-year period, the court ordered that surplus funds be transferred to a tax-exempt foundation established to study promotion of judicial management of complex litigation (primarily antitrust cases), to promote research and implementation of various aspects of the antitrust laws, and to pay possible future claims. *Ibid.*

3. Several defendants and plaintiff class members appealed the district court's ruling governing the disposition of the reserve fund. On appeal, the Court of Appeals for the Seventh Circuit affirmed that part of the district court's order holding that neither the defendants nor the previously paid claimants had any claim to the surplus funds. 89-927 Pet. App. 3g. The court of appeals also agreed that the surplus funds should be held for one year to cover any cognizable late claims by class members. 89-927 Pet. App. 4g.

But the court of appeals expressly reversed the district court's plan to use the remaining funds for a tax-exempt foundation, calling it a "miscarriage of justice and an abuse of discretion." 89-927 Pet. App. 4g. Instead, the court of appeals ruled that funds left over after payment of late claims must be disposed of pursuant to 28 U.S.C. 2041 and 2042. 89-927 Pet. App. 4g. Section 2041 provides that all funds "paid into any court of the United States" or "received by the officers thereof" in pending or adjudicated cases "shall be deposited forthwith with the Treasurer of the United States * * * in the name and to the credit of such court," subject to later delivery to "the rightful owners." Section 2042 provides that when "the right to withdraw money deposited in court under section 2041 has been adjudicated or is not in dispute," and the money has remained unclaimed for five years, the court then "shall cause such money to be deposited in the name and to the credit of the United States." Once this transfer has taken place, Section 2042 permits "[a]ny claimant entitled to such money" to obtain its money by petitioning the court and giving notice to the United States Attorney.

The court of appeals ruled that 28 U.S.C. 2042 governs the disposition of any surplus remaining in the reserve fund. 89-927 Pet. App. 4g-5g. The court noted that the "escheat" provided for by Section 2042 is not permanent because the United States must pay the funds to proper claimants if they appear. 89-927 Pet. App. 5g. The court of appeals did not remand the matter to the district court; rather, it used mandatory language specifying that the Administration Committee should hold the reserve fund available for one year and that the remainder of the reserve fund "shall escheat to the United States subject to the conditions expressed in 28 U.S.C. §§ 2041 and 2042." 89-927 Pet. App. 6g.

In response to a rehearing petition, the court of appeals emphasized that its order "merely implements a direct

Congressional mandate for the disposition of residual funds deposited with a district court." *In re Folding Carton Antitrust Litigation*, 744 F.2d 1252, 1259 (7th Cir. 1984). The court of appeals explained that it had not simply substituted its equitable judgment for that of the district court, but rather had ordered disposition of the funds pursuant to the statutory requirement of Section 2042. The district court had abused its discretion because it lacked authority to establish a research foundation and to fund it with the unclaimed money from the reserve fund. 744 F.2d at 1260. The court of appeals ciarified that its use of the term "escheat" to describe the process under Section 2042 was not meant "in the same sense as reference to escheats to the states." *Ibid.*

On October 11, 1984, the court of appeals denied a motion to stay its mandate. The court observed that no judge had requested en banc review, that its ruling disposing of the surplus in the reserve fund in accordance with 28 U.S.C. 2042 was clearly correct, and that this issue "seldom recurs." Gov't C.A. App. 16. Consequently, the court of appeals' mandate issued on October 17, 1984, and was entered on the district court docket sheet. Gov't C.A. App. 17. That mandate has never been recalled.

4. The United States had no involvement in the civil antitrust litigation up to that time. In December 1984, the parties notified the United States Attorney's Office in Chicago that the court of appeals had ruled that, after the year for late claimants had run, the United States was to take control of the surplus in the reserve fund pursuant to 28 U.S.C. 2042. At the same time, however, several parties had filed certiorari petitions in this Court, and the district judges who had presided over the district court proceedings themselves had filed a petition for a writ of mandamus or certiorari in this Court.

While the various petitions seeking this Court's review were pending, the parties—none of whom had a legal or equitable interest in the reserve fund after payment of late claims—negotiated a settlement agreement among themselves which disposed of the reserve fund in a manner contrary to the court of appeals' mandate. After payment of late claims by September 1985, the parties agreed—despite the unequivocal wording of the court of appeals' opinion—that they would divide the remaining money in two parts: one half would be paid *pro rata* to all previously compensated class members; the other half would be paid to two or more Chicago area law schools to fund research projects involving enforcement of the antitrust laws and management of complex litigation, and to assist law students in financial need.[1] Gov't C.A. App. 29-32.

The parties submitted this settlement proposal to the district court at a hearing on March 21, 1985. The district court recognized that the court of appeals' mandate had issued. But it asserted that the court of appeals' ruling—which the district court described as "silly"—was not "final" and therefore did not bind the district court. Gov't C.A. App. 20-22. (Paradoxically, the district court requested the parties to ask the court of appeals to extend the time for filing late claims. Gov't C.A. App. 23.) In any event, the district court stated that the parties "better" check with the U.S. Attorney's office to see "whether they have any position they want to take." Gov't C.A. App. 24. One of the attorneys for the parties apparently met with a supervising Assistant United States Attorney, who told him that the United States had no objection to the entry of the settlement. Gov't C.A. App. 58.

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[1] A copy of the proposed settlement was sent to the U.S. Attorney's Office on March 18, 1985. Gov't C.A. App. 57.

On March 27, 1985, the district court held a second hearing on the proposed settlement. Although it acknowledged one party's concern that the district court could not approve a settlement under the circumstances, Gov't C.A. App. 26, the court nevertheless did so. At the end of the hearing, counsel for some of the previously paid claimants told the court that, although no representative from the U.S. Attorney's office was present, that office had been consulted and had indicated "no objection to this resolution of the dispute." Gov't C.A. App. 28.

The settlement was signed by representatives of the parties on March 28, 1985, and was approved by the district court on April 1, 1985. No one signed the settlement on behalf of the United States. Gov't C.A. App. 29-32. In May 1985, the district judges and the parties moved to dismiss the petitions they had filed in this Court, and the various petitions were then dismissed under then-applicable Sup. Ct. R. 53 (1980). *In re Robson*, 471 U.S. 1120 (1985).[2]

In early 1986, a member of the claimant class that had not previously filed a claim, Anheuser-Busch Companies, Inc., moved to vacate the settlement. Anheuser-Busch asserted that the March 1985 settlement was "in direct contradiction to the mandate" of the court of appeals insofar as it provided for further payments to previously paid claimants and for grants to Chicago law schools. The company contended that only payment to late claimants would be consistent with the court of appeals' ruling.

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[2] Petitioner in No. 89-927 states that the petitions were "voluntarily dismissed as moot." Pet. 8. Under Rule 53.3, however, no mandate or other process is issued pursuant to the voluntary dismissal unless this Court directs otherwise. Because no mandate or process was issued by this Court, the Rule 53 dismissal in this case did not determine that the case was moot, nor did it vacate the Seventh Circuit's outstanding mandate.

Although the motion to vacate the settlement was fully briefed, the district court never ruled on it because the parties agreed to amend the March 1985 settlement to pay Anheuser-Busch and other late claimants. Gov't C.A. App. 36-37, 40. The district court approved this superseding settlement agreement in September 1986, even though it left intact the provisions of the March 1985 settlement that Anheuser-Busch had attacked as violative of the court of appeals' September 1984 ruling. Gov't C.A. App. 36-37. In December 1986, the district court ordered disbursement of approximately $0.6 million to late claimants and more than $1.7 million to previously paid claimants. Gov't C.A. App. 7.[3] There is no indication that the United States received advance or contemporaneous notice of the superseding settlement agreement or any of the other activities occurring after the March 1985 settlement.

5. In February 1987, an unpaid late claimant filed a *qui tam* action under seal pursuant to the False Claims Act, 31 U.S.C. 3729 *et seq.* The *qui tam* plaintiff contended that the settlement negotiated by the parties and approved by the district court violated 28 U.S.C. 2042 and the court of appeals' mandate.

Under the False Claims Act, the federal government had the option to decide whether or not to intervene and proceed with the litigation. While the Justice Department was considering whether to do so, in March 1987, the district court ordered that $1.2 million from the reserve fund be paid to Loyola University School of Law for one of the research projects contemplated by the March 1985 settlement. Gov't C.A. App. 8. The order allowed the school to use the interest generated by the principal amount with a reversionary interest in the district court. Six days later, the

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[3] At that point, the surplus in the reserve fund totaled more than $7 million. Gov't C.A. App. 59-60.

United States made an emergency motion to vacate or stay that order as violative of the court of appeals' mandate. Gov't C.A. App. 45-46.[4]

In May 1987, the Justice Department decided not to intervene in the *qui tam* action.[5] Shortly thereafter, in June 1987, the district court ordered that $156,000 of the reserve fund be transferred to the University of Chicago Law School for another research project contemplated by the March 1985 settlement. Gov't C.A. App. 9.

Several weeks later, on July 14, 1987, the United States moved to intervene in the district court pursuant to Federal Rule of Civil Procedure 24(a) and to vacate the settlement as violative of the court of appeals' mandate. The government argued that the district court lacked authority to enter an order disposing of the excess funds in a manner plainly in contravention of the appellate mandate, which had never been withdrawn or overruled and which therefore stood as the law of the case. The United States further argued that no representative of the United States had ever appeared in court to agree to the stipulated settlement; that the settlement was not signed by any representative of the United States; and that none of the parties had ever consulted with or received either written or oral approval from a representative of the United States authorized to settle a matter involving several million dollars. Because no one in authority had approved the settlement on behalf of the government, the United States urged that the settlement was a nullity.

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[4] At that time, the government notified the district court *in camera* of the pending *qui tam* action.

[5] That action was subsequently dismissed because the plaintiff was not a proper relator under the False Claims Act. The dismissal order was appealed to the court of appeals, which affirmed the dismissal of the *qui tam* action in the same decision now before this Court. 89-927 Pet. App. 17b-22b. No party has asked this Court to review the *qui tam* ruling.

On May 24, 1988, the district court denied the motions filed by the United States. It held that the motion to intervene was untimely, and in the alternative held that, even if the intervention request was timely, the motion to set aside the settlement must be denied. 89-927 Pet. App. 12j-22j. The district court offered three reasons for preserving the settlement agreement. First, it opined that the mandamus and certiorari petitions pending in this Court meant that the court of appeals' mandate "was not final at the time of the settlement" and therefore did not bind the parties or the district court. 89-927 Pet. App. 22j-23j. Second, the district court reasoned that the court of appeals had disapproved only the district court's exercise of its equitable power and had not taken away its power to approve a settlement stipulation, even if that stipulation was inconsistent with the appellate mandate. 89-927 Pet. App. 23j-24j. Third, the district court ruled that the U.S. Attorney had effectively joined the settlement agreement, thereby surrendering the United States' interest in the reserve fund, when members of the U.S. Attorney's Office indicated orally to lawyers for the other parties that their Office did not object to the settlement. 89-927 Pet. App. 27j-30j. The district court acknowledged that under long-established federal regulations, authority to compromise a claim of this magnitude rests solely with the Attorney General or the Deputy Attorney General, and that neither the United States Attorney nor his subordinates have authority to enter into such an agreement. See 28 C.F.R. 0.160(a)(2), 0.161, 0.168(a), and Appendix to Subpt Y, Sec. l(c)(2). But the district court held those regulations inapplicable because it deemed the settlement not to be a "money claim" within their terms. 89-927 Pet. App. 28j.

6. The United States petitioned the court of appeals for a writ of mandamus to enforce the court's earlier mandate

and appealed from the district court's order.[6]

In its mandamus petition, the United States relied on the plenary power of an appellate court to enforce its mandate. The government noted that the court of appeals' earlier mandate regarding the disposition of the reserve fund had obviously been violated, and that the parties could not devise among themselves (and the district court could not approve) a settlement contrary to the mandate, especially in a class action under Federal Rule of Civil Procedure 23. The United States renewed its contention that the U.S. Attorney lacked authority to surrender the interest of the United States in the reserve fund, and added that the government may not be bound by unauthorized oral statements from the U.S. Attorney's Office on any theory of estoppel. Finally, the United States contended that its intervention motion had been timely, but that, even if the motion was untimely, the United States was empowered to enforce the mandate as if it were a party under Rule 71 of the Federal Rules of Civil Procedure, which provides that when an order is made "in favor of a person who is not a party to the action," the person "may enforce obedience to the order by the same process as if a party."

The court of appeals affirmed in part and reversed in part. It recognized that the settlement agreement "was not in keeping with the mandate of this court," and that "it was not * * * the prevailing parties who purported to give the balance of the fund away, but the [Administration] Comm[ittee] and the district court, neither of which had any rights to the money they distributed." 89-927 Pet. App. 6b, 9b.

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[6] Because the court of appeals' original mandate did not remand the case to the district court, it is not clear that the district court had jurisdiction to enter further orders regarding the reserve fund.

Nonetheless, the court of appeals refused to permit the United States to enforce the terms of the court's original mandate, which had directed that the surplus funds be deposited in the Treasury "in the name and to the credit of the United States" as required by 28 U.S.C. 2042. The court of appeals considered at length whether the Department of Justice's regulations authorized the U.S. Attorney to consent to the settlement agreement, but although the court questioned the government's interpretation of the regulations, it ultimately declined to resolve that question. 89-927 Pet. App. 10b-13b. Instead, the court held that the United States was estopped from denying the authority of the U.S. Attorney's Office to consent to the settlement agreement. 89-927 Pet. App. 13b-14b. The court concluded that by virtue of this estoppel, "any interest the United States may have had under 28 U.S.C. § 2042 is extinguished." 89-927 Pet. App. 14b. The court indicated that the same considerations which supported estoppel made the government's attempt to intervene under Rule 24(a) untimely. 89-927 Pet. App. 14b.

Although the court of appeals held the United States estopped, it made no attempt to explain how the traditional requirements of estoppel were satisfied here, nor did it identify any affirmative misconduct on the part of the government. See 89-927 Pet. App. 13b-14b. Under established Seventh Circuit precedent, the government may not be estopped unless all of the traditional elements of estoppel are present and the government is further shown to have engaged in "affirmative misconduct." See, *e.g.*, *Portmann* v. *United States*, 674 F.2d 1155, 1167 (7th Cir. 1982). The court of appeals alluded to this authority, but apart from noting that the U.S. Attorney's actions had prejudiced the other parties and the court's earlier mandate, the court offered no explanation for its estoppel ruling. 89-927 Pet. App. 13b.

Because the United States was deemed to have no further interest in the reserve fund, the court of appeals declined to disturb the distributions to the class claimants who had already been paid, despite the fact that the original Seventh Circuit panel had ruled that additional payments to previously compensated plaintiffs should not be made. 89-927 Pet. App. 14b.[7] At the same time, however, the court of appeals held that its mandate had been impermissibly violated by the grants to the law schools for antitrust research, a disposition which bore too close a resemblance to the research foundation the court of appeals had disapproved in its first opinion. 89-927 Pet. App. 14b-15b. Accordingly, the court of appeals ordered that the grants to the law schools be retrieved, and that the funds be distributed at the discretion of a new district judge under the *cy pres* doctrine. 89-927 Pet. App. 15b-16b.

The class plaintiffs and the district judge separately sought rehearing en banc. The rehearing petitions were denied without opinion on September 15, 1989. The district judge subsequently filed a petition for a writ of mandamus or prohibition or, in the alternative, a petition for a writ of certiorari on December 11, 1989 (No. 89-927). The class plaintiffs and the Administration Committee filed separate petitions for writs of certiorari on the same date (Nos. 89-992 and 89-1081).

ARGUMENT

More than six years have passed since the beginning of the controversy over the reserve fund, and the underlying class actions themselves will soon enter their fifteenth year. Like the petitioners—although for very different reasons—

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[7] The court did hold that no further payments could be made to this group, or to the defendants, or to any future late claimants. 89-927 Pet. App. 16b.

the United States disagrees with the court of appeals' latest ruling.[8] But the court's decision presents no legal issue of sufficient importance, and no result of sufficient consequence, to warrant further review by this Court.

1. The sequence of events that led to the current decision of the court of appeals was highly irregular and is unlikely to recur. The controversy began with a substantial unclaimed remedial fund to which no private party had a valid legal claim. The conflicting claims to the fund led to a remedial order which was overturned on appeal. Certain of the parties then negotiated a post-appeal settlement that plainly violated the appellate mandate, but rather than seeking relief from that mandate in the court of appeals, the parties turned to the district court. The district court approved the settlement, then was met with a post-settlement motion for relief by the beneficiary of the original appellate mandate. Finally, when the beneficiary's motion for relief was denied, a second appeal ensued to determine the effect of the settlement and the original appellate mandate.

This is a sequence of events which, it may fairly be hoped, will not be repeated. Because the court of appeals' decision depends so heavily on the peculiar circumstances of this case, including the scope of the Seventh Circuit's own prior mandate and the events following that court's first decision, the latest ruling is not likely to have general significance beyond the confines of this case. For better or worse, the court of appeals saw its task as bringing an end to the near-interminable controversy over the disposition of the reserve fund. 89-927 Pet. App. 8b-9b. The court of appeals did not purport to establish, and did not in fact establish, any more general principles of law. In sum, this is a unique decision

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[8] The United States' disagreement with the court of appeals' estoppel ruling is described in our cross-petition in this case.

which rests on a unique set of facts, and its novelty counsels strongly against plenary review by this Court.

2. In an effort to invest the decision below with greater significance, the petitioners in No. 89-927 and 89-992 contend that the court of appeals disregarded settled limitations on its jurisdiction under Article III of the Constitution. 89-927 Pet. 11-17; 89-992 Pet. 3, 9-10. The petitioners argue, in essence, that if parties settle a case on terms inconsistent with a binding prior mandate of an appellate court, Article III bars the appellate court—even this Court—in all circumstances from enforcing its outstanding mandate. Cf. 89-927 Pet. 7. Under petitioners' theory, the settlement provides a safe harbor in which the parties can violate appellate mandates with impunity.

The short answer to petitioners' argument is that it is at odds with this Court's own precedents. Those precedents make clear that a court's power to enforce its mandate may not be unilaterally circumscribed by an agreement of the parties that is inconsistent with the terms of the mandate.

For example, in *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967), an antitrust action, the Court noted that in an earlier opinion it had ordered "divestiture without delay," *id.* at 131. Divestiture did not take place as required by this Court's mandate, however, and parties who were denied intervention in the remand proceedings appealed. On appeal, the United States contended that the divestiture issues were not properly before the Court because the United States, as the antitrust plaintiff, had agreed to a settlement of the litigation after this Court's first ruling. *Id.* at 131-132, 136. This Court rejected that contention: "We do not question the authority of the Attorney General to settle suits after, as well as before, they reach here. The Department of Justice, however, by stipulation or otherwise[,] has no authority to circumscribe the power of the courts to see that our mandate is carried out." *Id.* at 136.

Similarly, in *United States* v. *E. I. du Pont de Nemours & Co.*, 366 U.S. 316 (1961), on remand from this Court, the United States asserted that the district court could consider only the remedy proposed by the government. When the case returned to this Court, the appellees argued that the government was then estopped from urging other remedies before this Court. 366 U.S. at 325 n.6. The Court, noting its "plenary power" to see that the lower court followed its earlier ruling, rejected the appellees' argument because "no stipulation by the Government could circumscribe this Court's power to see that its mandate is carried out." *Id.* at 326 & n.6. See also *Utah Public Service Comm'n* v. *El Paso Natural Gas Co.*, 395 U.S. 464 (1969) (Supreme Court not required to dismiss case, despite unanimous request by parties to do so, when case raises question of district court's compliance with Supreme Court's prior mandate).

The courts of appeals likewise insist that an appellate court's power to enforce its mandate is not terminated by a subsequent settlement that is at odds with the terms of the mandate. See, *e.g.*, *ATSA, Inc.* v. *Continental Insurance Co.*, 754 F.2d 1394, 1396 (9th Cir. 1985) ("[e]ven at the joint request of the litigants, the district court may not deviate from the mandate of an appellate court"); *Slotkin* v. *Citizens Casualty Co.*, 698 F.2d 154, 155 (2d Cir. 1983) (the rule that a lower court must faithfully execute the mandate of the court of appeals "prohibits litigants from circumventing such lower-court compliance by stipulation or otherwise"). Thus, the court of appeals in this case was hardly departing from settled Article III jurisprudence, as the petitioners suggest, when it partially overturned the settlement agreements as contrary to its prior mandate.[9]

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[9] For similar reasons, the existence of the court of appeals' mandate vitiates petitioners' claims that the decision below undermines the set-

The petitioners' challenge to the court of appeals' power is particularly misconceived because this litigation involves the settlement of class action claims. Because class action settlements may affect interested persons other than those immediately before the court, Fed. R. Civ. P. 23(e) prohibits class actions from being compromised without the prior approval of the district court. We are aware of no authority, and the petitioners have offered none, that suggests that this authorization for district court review of proposed class action settlements runs afoul of Article III. And if a district court may review a class action settlement without exceeding its powers under Article III, it is difficult to imagine how Article III could bar an appellate court—including this Court—from undertaking the same task.[10]

Ironically, under petitioners' reasoning *no court*, not even the district court, had Article III jurisdiction because no live case or controversy existed with respect to the reserve fund. At the time the parties to the civil antitrust litigation entered into negotiations over the fate of the reserve fund, the district court had ruled, and the court of appeals had affirmed, that no party had a legal or equitable interest in any amount remaining in the reserve fund after payment of late claims. It is difficult to visualize how the "parties"

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tlement process and discourages attorneys from serving on administrative committees. 89-927 Pet. 17-20; 89-1081 Pet. 2. The prior, outstanding appellate mandate provided ample notice that the parties could not enter into settlement negotiations directly contrary to the mandate, and that the members of the Administrative Committee should not expect compensation for professional services rendered to make disbursements inconsistent with that mandate.

[10] Petitioners' generic authorities merely state that a court may not act in the absence of jurisdiction and a live case or controversy. See 89-927 Pet. 13 n.14, 14-15; 89-992 Pet. 9-10 & n.2. The cited cases shed little light on the question whether the court of appeals had jurisdiction to enforce its prior, outstanding mandate.

could compromise a "dispute" over money to which they had no greater claim than any other citizen of the United States.

3. The only other contention by the petitioners which merits comment is their claim that the decision in this case conflicts with this Court's decision in *United States* v. *Munsingwear*, 340 U.S. 36 (1950), and its progeny. That claim is simply incorrect.

In *Munsingwear*, this Court held that when a case becomes moot during the course of appellate review through "happenstance," the party seeking appellate review is entitled to have the judgment of the lower court vacated. 340 U.S. at 39-40. This Court has applied the *Munsingwear* rule only when a case has become moot "due to circumstances unattributable to any of the parties." *Karcher* v. *May*, 484 U.S. 72, 83 (1987). Even when *Munsingwear* applies, moreover, a party that has *failed* to avail itself of its right to have a lower court judgment vacated may not thereafter avoid the effects of the judgment. In *Munsingwear* itself, this Court held that the United States was bound by a prior district court judgment, even though the case had become moot on appeal, because the United States had not asked the court of appeals to vacate the district court's judgment. 340 U.S. at 38-41.

In this case, even if one assumes that the parties' March 1985 settlement agreement rendered the controversy over the reserve fund moot, that the resulting mootness came about because of "circumstances unattributable to any of the parties," *Karcher*, 484 U.S. at 83, and that an ungranted petition for discretionary review should be treated the same as an appeal as of right for purposes of the doctrine governing mootness on appeal—even if all these prerequisites are assumed—then petitioners still had to respect the outstanding court of appeals' mandate because they failed to have it vacated as moot. Cf., *e.g.*, *Walker* v. *City of*

Birmingham, 388 U.S. 307, 316-317, 320-321 (1967) (parties may not ignore injunction notwithstanding strong arguments that statute authorizing injunction was facially overbroad under the First Amendment and that injunction itself contravened the First Amendment); *United States* v. *United Mine Workers*, 330 U.S. 258, 293 (1947) (parties may not ignore injunction issued by court arguably without jurisdiction to do so). Indeed, petitioners occupy no better position than did the United States in *Munsingwear*, which forfeited its right to have the district court judgment vacated and was accordingly bound by the judgment thereafter. The parties here did not seek to have the court of appeals' mandate vacated when they dismissed their petitions before this Court. For that reason, *Munsingwear* is entirely consistent with the court of appeals' enforcement of its mandate in this case.

As petitioners observe, several courts of appeals have gone beyond *Munsingwear* to hold that a district court's judgment must be vacated if the parties settle their controversy on appeal, while other courts have held that the judgment need not be vacated in such circumstances. Compare *Federal Data Corp.* v. *SMS Data Prods. Group, Inc.*, 819 F.2d 277, 279-280 (Fed. Cir. 1987), and *Kennedy* v. *Block*, 784 F.2d 1220, 1225 (4th Cir. 1986), with *National Union Fire Ins. Co.* v. *Seafirst Corp.*, No. 88-3970 (9th Cir. Dec. 12, 1989), and *In re Memorial Hospital*, 862 F.2d 1299, 1301-1303 (7th Cir. 1988). In each of these cases, however, the issue was whether a party that has acted in a timely fashion is entitled to have a lower court's judgment vacated—not whether, as here, the party may disregard the judgment with impunity when it has "slept on its rights," *Munsingwear*, 340 U.S. at 41, by failing to apply for vacatur. Thus, even assuming that the conflict identified by petitioners merits this Court's attention, this case is not an appropriate vehicle to resolve it.

CONCLUSION

The petition for a writ of mandamus or prohibition or, in the alternative, for a writ of certiorari in No. 89-927, and the petitions for a writ of certiorari in No. 89-992 and No. 89-1081, should be denied.

Respectfully submitted.

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Nos. 89-927, 89-992 and 89-1081

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

IN RE HUBERT L. WILL, Senior Judge, United States District Court for the Northern District of Illinois,
Petitioner,

CERTIFIED PLAINTIFF CLASS IN MDL-250,
Petitioner,

v.

FOLDING CARTON RESERVE FUND, *et al.*,

FOLDING CARTON ADMINISTRATION COMMITTEE: THOMAS J. BOODELL, JR., PERRY GOLDBERG, JAMES B. SLOAN and ALEXANDER R. DOMANSKIS,
Petitioner,

v.

FOLDING CARTON RESERVE FUND, *et al.*

ON PETITION FOR A WRIT OF MANDAMUS OR PROHIBITION AND PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOINT REPLY OF PETITIONERS TO GOVERNMENT'S BRIEF IN OPPOSITION

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February 15, 1990

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

Nos. 89-927, 89-992 and 89-1081

IN RE HUBERT L. WILL, Senior Judge, United States District Court for the Northern District of Illinois,
Petitioner,

CERTIFIED PLAINTIFF CLASS IN MDL-250,
Petitioner,

v.

FOLDING CARTON RESERVE FUND, *et al.*,

FOLDING CARTON ADMINISTRATION COMMITTEE: THOMAS J. BOODELL, JR., PERRY GOLDBERG, JAMES B. SLOAN and ALEXANDER R. DOMANSKIS,
Petitioner,

v.

FOLDING CARTON RESERVE FUND, *et al.*

ON PETITION FOR A WRIT OF MANDAMUS OR PROHIBITION AND PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOINT REPLY OF PETITIONERS TO GOVERNMENT'S BRIEF IN OPPOSITION

Petitioners in Nos. 89-927, 89-992 and 89-1081 jointly file this brief in reply to the Government's opposition to their Petitions for review.

ARGUMENT

1. All parties to the proceedings below agree that the court of appeals' judgment was incorrect. The Government concurs. No one has come forward to support what the Seventh Circuit judges did. Even the judges themselves, respondents in *In re Hubert L. Will*, No. 89-927, have declined to present reasons why their decision should be upheld.

2. The Government's Brief in Opposition concedes that the court of appeals' decision was wrong, but says that it should not be reviewed because it is "unique" and "novel," and that its "peculiar circumstances" present no "legal issue of sufficient importance, and no result of sufficient consequence, to warrant further review by this Court." (Br. at 15-16.) On the contrary, we respectfully suggest that the "peculiar circumstances"—the unprecedented abuse of appellate court authority below—constitute an argument for and not against review.

When a court of appeals enforces its own desires as to how funds subject to a settlement agreement should be disbursed—contrary to the wishes of every party and every interested non-party—that is an error that is sufficiently serious to be addressed the *first* time it occurs. The principal vice in this matter is that the court below exceeded its constitutional power and acted *sua sponte* and not at the request of any party.

The Constitution gives power to judges only in cases or controversies to be decided between contending

parties, in which the courts themselves have no interest and with respect to which their judgment will be impartial and so regarded. Here, there were no contending parties. The court of appeals judges acted on their own views of public policy and in excess of the powers granted to them under the Constitution. The errors committed by the court below thus derive from its abandonment of the case or controversy requirement of article III—a matter of enormous and dangerous significance.

The Government's brief expresses the "hope[ ]" that the "sequence of events" that led to the filing of Petitioners' Petitions "will not be repeated." (Br. at 15.) If this Court fails to correct the court of appeals' errors, however, the opposite is the more likely result. Innumerable cases, including class actions, are routinely settled after a trial court's judgment is entered or an appellate court's mandate is issued. In almost all, the settlement varies from the trial court's judgment or the appellate court's mandate—that is why the parties settle. If the courts' own views are permitted to become an impediment to settlements, the ability to achieve settlements, which are encouraged in the interest of judicial economy and as a matter of public policy, especially with respect to class actions, will be substantially diminished.

3. The Government erroneously contends that the precedents of this Court and the courts of appeals "make clear that a court's power to enforce its mandate may not be unilaterally circumscribed by an agreement of the parties that is inconsistent with the terms of the mandate." (Br. at 16.) The settlement herein was not "unilateral"; it was a settlement agreed upon by all the parties and unopposed by any

interested non-party (including, in all pertinent respects, the Government).[1] There is no precedent—none whatever—for a court to exercise a roving authority to modify a settlement that it does not like even though no party or interested non-party objects to it.[2]

In each of the cases cited by the Government, some party or interested non-party objected to a settlement and asked that the court's mandate be carried out.[3]

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[1] The Government did, of course, register an untimely objection to the settlement, claiming the funds should escheat to the federal treasury, but the court of appeals held that the Government lacked standing and rejected escheat. The vacatur of the law school grants ordered by the court below had not been sought by the Government or by anyone else; it was strictly the judges' own idea.

[2] We note that the court of appeals did not set aside all aspects of the settlement that were inconsistent with its prior decision and mandate. The 1989 panel acknowledged, for example, that 28 U.S.C. § 2042 was not applicable even though the 1984 panel had held otherwise. The 1989 panel held that the *cy pres* doctrine—not section 2042—governed the distribution of any residue in the settlement fund. It also held that the additional distribution to plaintiff class members as provided in the settlement was proper even though the 1984 panel had denied them any further distribution. The only provisions of the settlement disapproved below were the grants to the two law schools. The court had no authority to rewrite the contract of settlement between the parties, approving one part and rejecting another. *See Imperial Fire Ins. Co.* v. *Coos County*, 151 U.S. 452, 462 (1894); *Davies* v. *Continental Bank*, 122 F.R.D. 475, 478 (E.D. Pa. 1988).

[3] For example, in *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967), the State of California and certain private entities that would have benefited from a divestiture ordered by this Court objected to a subsequent settlement that did not require complete divestiture. Noncompliance with the same divestiture order was alleged in *Utah Public Ser-*

In each of these cases, the court acted to ensure that its mandate was carried out to protect the interests of the objecting parties who were properly before the court. In each, there was a genuine case or controversy that the court undertook to resolve.

That was *not* the case here. In the instant case, the court of appeals did not purport to protect the interests of any party before the court, or even the interests of any non-party. The court of appeals, contrary to the interests and wishes of all parties, advanced solely its own fixed idea that the funds should

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vice Comm'n v. *El Paso Natural Gas Co.*, 395 U.S. 464 (1969), by consumer spokespersons who briefed and argued the case before this Court. Similarly, in *United States* v. *E.I. du Pont de Nemours & Co.*, 366 U.S. 316 (1961), the Government objected that the district court's acceptance of du Pont's proposed divestiture decree, which did not provide for complete divestiture, was contrary to this Court's mandate.

The court of appeals cases cited by the Government are also inapposite because they, too, involved objections by parties to alleged instances of noncompliance with the appellate court's mandate. *ATSA, Inc.* v. *Continental Insurance Co.*, 754 F.2d 1394 (9th Cir. 1985), involved a petition for a writ of mandamus by two of several parties to an arbitration agreement who contended that the district court had entered an order inconsistent with the court of appeals' mandate.

In *Slotkin* v. *Citizens Casualty Co.*, 698 F.2d 154 (2d Cir. 1983), the appellants had been given two alternatives in a prior court of appeals decision: (1) to reinstate a $680,000 verdict and judgment against four of the original defendants or (2) to retry the case against all of the original defendants except one. Instead, appellants settled with four defendants and attempted to retry the case against the others. The other defendants objected and the district court dismissed the complaint against them on the ground that the plaintiffs had not complied with the appellate court's mandate. The court of appeals affirmed.

not be disbursed for the particular purposes of studying the antitrust laws or the performance of juries in complex cases.

We do not dispute that a court—trial or appellate—has authority to enforce its judgment or mandate if some interested person raises the issue of whether it is being carried out. We do dispute that a court may modify on its own motion a settlement to which no one objects. That broad and dangerous extension of the law is indeed unique and novel and should be put to early rest by this Court.

4. The courts' authority to review class action settlements pursuant to Fed. R. Civ. P. 23(e) is not at issue. Approval is required to protect the interests of non-litigant class members, *see Jenson* v. *Continental Fin. Corp.*, 591 F.2d 477, 482 n.7 (8th Cir. 1979)—for example, to prevent a fiduciary from unfairly discriminating against some persons as opposed to others in the distribution of funds. It is *not* a mechanism that authorizes the courts, in the absence of any objection from or prejudice to class members and in the absence of any case or controversy, to modify proposed settlement agreements because of their own preferences.

5. The Government suggests (Br. at 15) that "the court of appeals saw its task as bringing to an end the near-interminable controversy over the disposition of the reserve fund" and implies that denial of the pending Petitions will somehow facilitate achieving that end. In fact, it will have a contrary effect. The court of appeals' actions undid a final distribution process that was near completion and that would have concluded the lengthy *Folding Carton* litigation.

By operation of the settlement, all but $600,000 of the $6,000,000 residual fund had been distributed prior to the court of appeals' August 9, 1989 opinion. Distribution of the remaining $600,000 would have been accomplished quickly had the 1989 panel not set aside the law school grants and ordered that a new judge take over disposition of the fund.

The court of appeals' action, if not reversed, will mean that the Honorable Ann C. Williams, to whom the case has been assigned on remand, will have a fund of well over $2,000,000[4] in which any organization in the country believing that it can justify a grant under the *cy pres* doctrine can seek to share. Already, a number of grant applications from a variety of applicants—law schools, legal assistance organizations, legal think tanks, attorneys general of various states, the Federal Judicial Center Foundation and others—have been received. If this Court denies the pending Petitions and permits the court of appeals' order to stand, there undoubtedly will be many more.

How long it will take the new judge to determine which of the new applications to approve (the old grants being prohibited) is impossible to predict, especially since the court of appeals purports to retain jurisdiction over the distributions, presumably for the purpose of approving or rejecting them even though no one objects—another proposed *sua sponte* intervention. Certainly, this new process will not be as

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[4] The court of appeals opinion requires the two law school grants totalling $1,356,000 to be restored to the fund bringing the total undistributed fund, including accrued interest, to over $2,000,000.

expeditious as Judge Will's disposition pursuant to the settlement of the last $600,000 to Chicago area law schools.

6. The decision below also directed that no fees be paid to the lawyers for work performed assisting the district court in the proposed distributions to Chicago law schools. If that decision is allowed to stand, it will substantially limit the ability of district courts to enlist the aid of lawyers in administering complex litigation. Lawyers will be less willing to devote their time to such efforts if the rule is that reasonable compensation for such services promised by the district court may be denied at the whim of a court of appeals, even if there is no objection. The decision below thus poses a grave threat to the orderly resolution of complex cases, and this Court should act promptly to correct the matter.

7. The Government also erroneously contends that the 1984 panel's mandate remained and remains binding on the parties because they did not go back to the panel after settling the case to have the mandate vacated. But there is no magic to an appellate mandate; it is simply a tool for resolution of a case or controversy. When all interested persons settle a matter, no case or controversy continues to exist, and it is folly to suppose that an appellate court has the power to go back and enforce its mandate against everyone's wishes.

If every time parties settled a case on terms different from the judgment or mandate—as is almost always the case—they were required to go back to court to get the judgment or mandate formally vacated, the settlement process would become more cumbersome, the courts would be burdened with a

pointless exercise, and settlements would be jeopardized if the courts declined to vacate. This is yet another unfortunate implication of the opinion below, and the Court should correct it.

8. The Government makes no reference to several other serious errors noted in our Petitions, which must be corrected before they become precedents. These include the panel's erroneously:

> 1. Converting a mandamus action into an ordinary appeal, denying a motion to treat the action as a mandamus proceeding, and then deciding it by the standards governing ordinary appeals rather than the higher standards applicable to mandamus actions.
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> 2. Holding that funds generated in what was then the largest antitrust case in history may not, under the *cy pres* doctrine, be used to study the antitrust field or the role of juries in complex cases.
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> 3. Ordering that a complex multidistrict case be transferred from the judge who had presided over it successfully from its inception, and supervised the creation of a fund of over $230,000,000 and the distribution of over $229,400,000 of that fund, to a new judge.
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> 4. Reserving jurisdiction to review *sua sponte* the new judge's grants even though no one objects to them.

* * *

The basic vice of the court of appeals' judgment in this case was its failure to observe the judicial function of deciding cases and controversies and, instead,

proceeding on a detour of its own. This is the cause of all the difficulties pointed out herein and in Petitioners' Petitions, and the reason that it is important that this matter be decided by this Court rather than allowing the lower court's unconstitutional judgment to remain in effect.

CONCLUSION

For the reasons set forth above and in the pending Petitions, the Court should issue a writ of mandamus or prohibition or certiorari to prevent the important unfortunate consequences of the decision below.

Respectfully submitted,

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